Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

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December 9,2002

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SUMMARY OF COMMENTS

The American Teleservices Association ("ATA") is a not-for-profit trade association representing the interests of teleservices providers and users in the United States. One of ATAs functions is to help its 2,500 members adhere to ethical practices and to comply with federal and state laws governing telemarketing. In connection with this mission, ATA has from the beginning supported the FCC's rules implementing the Telephone Consumer Protection Act ("TCPA), including the company-specific "do-not-call" list requirement. The Commission, however, noting that it has been ten years since its initial rules were adopted, issued a Notice of Proposed Rulemaking ("NPRM") seeking comment on whether subsequent developments require it to revise the rules. The centerpiece of this inquiry is consideration of a national "do-not-call'' database – an option the Commission rejected in 1992.

As a general proposition, ATA agrees with the Commission that the many changes during the past decade support the current review of the TCPA implementing rules. However, ATA believes that any action taken pursuant to the instant NPRM must maintain an essential balance, prescribed by Congress and required by the Constitution, that preserves the' ability to engage in legitimate telemarketing activity while protecting reasonable privacy interests. While there is no doubt that the aggregate amount of telemarketing activity has increased since the early 1990s, this growth tracks the expansion of telecommunications and growth of the economy generally. During the same period, technical advances have emerged that empower individual homeowners to exert greater control over the range of calls they receive, and

courts have strengthened significantly the constitutional protections accorded to commercial speech.

Consequently, ATA believes that none of the technological or economic changes noted in the FCC's NPRM justify further restrictions on telemarketing. In fact, just the opposite is true. The FCC's proposal of a national "do-not-call'' database would significantly disrupt the careful balance that was struck in 1992. While some modifications of the rules may be warranted, as discussed in detail below, nothing justifies discarding the Commission's essential findings about how to implement the TCPAs balanced approach.

The World of Teleservices

The teleservices industry unquestionably has an image problem. Many people grumble about telemarketing generally, yet most use teleservices to get information about products or services and to make purchases. In this respect telemarketing is much like American politics. People disparage politicians generally, but – judging by the way they actually vote – are satisfied with their own congressmen. The Commission has recognized that, while many people find any unsolicited call to be "annoying," "[o]ther telephone subscribers to not react adversely to unsolicited calls" as evidenced by the fact that "a substantial number of people purchase the goods or services offered." Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1031 (1980).

Accordingly, the value of teleservices must be assessed in terms of the tangible benefits provided to consumers and the economy, and not on the basis of generalized expressions of distaste for telemarketing as a commercial tool. This proceeding is not about assessing certain people's "pet peeves." As Congress

recognized when it adopted the TCPA, telemarketing makes available valuable information on products and services, provides a wider variety of goods and services at lower costs, and offers the convenience of shopping without leaving home. The value consumers actually place on these services is shown by the more than $275 billion in annual revenue from outbound business-to-consumer sales, making teleservices the largest direct marketing system in America. This number, which amounted to nearly 4 percent of all consumer sales in 2001, is expected to grow to more than $402 billion by 2006.

Another factor contributing to the growth in the teleservices industry is the number of small businesses attempting to break into the marketplace over the past ten years. Because a telephone marketing campaign is one of the most cost-effective methods of new business generation, many small businesses rely on telemarketing to compete with larger companies. Indeed, the Small Business Administration reports that "telemarketing may be an effective method for small businesses to "contact potential customers or sell products or services." This helps explain why 75 percent of ATAs members are small businesses.

Telemarketing provides tangible benefits in the form of convenient access to goods and services, competition and lower prices, and jobs. The wide range of products and services available by telemarketing includes publications, telecommunications offerings and cable services, children's books, chimney sweeping, college and education loans, electric utility service, estate planning, financial management, home improvement, landscaping, legal services, milk delivery, real estate service, and wheelchair lifts and many other things. Taking just one example, nearly 60

percent of all new newspaper subscriptions are sold over the telephone each year. In many cases, consumers learn of products or services, including lower-priced mortgage loans, personal legal assistance, or other products, about which they otherwise might not have been aware.

This method of contacting prospective customers cannot simply be replaced by other forms of advertising, and it is a principal driver of competition. Telemarketing plays an important role in helping new entrants or competitors make inroads to their rivals' customer base, which benefits consumers through increased choices and lower prices. This is particularly true in the marketing of competitive telecommunications services – a significant FCC policy goal – where most residential consumers learn about competitive rates via telemarketing. Consequently, any new regulations that reduce the ability of firms to engage in telemarketing, or that increase its costs, are likely to increase prices.

The teleservices industry provides significant employment opportunities. Between five and six million jobs are attributable to telemarketing, and growth in this sector is more than twice the overall national job growth rate. The call center workforce alone **is** roughly as numerous as the nation's truck drivers, assembly line workers or public-school teachers. Most of these employees are women, 62 percent of which are working mothers, and just over a quarter are single working mothers. The positive employment contributions of the teleservices industry have prompted certain state governments to seek to attract telemarketing firms. For example, the Governor of West Virginia has cited telemarketing as a success story of his state's "guaranteed work force program," because it encouraged one telemarketing firm to add 300 new jobs in a

single community. Other state programs have not been as helpful. For instance, Indiana's aggressive "do-not-call'' program has forced call centers to shut down, costing jobs in that state.

Through its creation of jobs, the offering of services and the stimulation of a competitive and decentralized marketplace, the growth of the teleservices industry is consistent with the federal government's overall promotion of e-commerce. Teleservices further the same goals that e-commerce initiatives generally seek to advance: expediting commercial transactions, enhancing the variety of products and services available and consumers' wealth of knowledge about them, and stimulating price competition. Teleservices also enable consumers to complete commercial transactions from the convenience of their homes, and to provide diverse employment opportunities to many for whom traditional employment is either difficult or impossible. New federal regulations designed to limit or otherwise restrict telemarketing would undermine these goals.

History and Purpose of the TCPA

Congress recognized both the economic importance of telemarketing and the significant commercial free speech interests involved when it adopted the TCPA. The law provided that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in such a way that protects privacy of individuals and permits legitimate telemarketing activities." President George Bush signed the TCPA into law, he said, because it gives the Commission "ample authority to preserve legitimate business practices." The TCPA

requires the FCC to take First Amendment considerations into account in implementing the law.

When it was first proposed, the legislation that became the TCPA would have prescribed how the FCC should implement a national "do-not-call" list. In reaction to the initial proposal, members of the telemarketing industry made clear that they did not oppose reasonable regulations that were targeted to prevent specific abuses, but that a blanket database would be too restrictive. The industry pointed out that there was insufficient evidence to demonstrate that a national "do-not-call" list was the most cost-effective solution to consumer complaints, and that there was insufficient evidence to prove that consumers find commercial calls more of an invasion of privacy than other telephone solicitations. In response to these and other concerns, detailed language specifying how the FCC should implement a national "do-not-call" list was dropped, and replaced with a directive that the Commission consider alternatives to the national database in determining how to carry out the purpose of the bill.

The resulting law requires the FCC to strike a careful balance that respects consumer preferences without unduly restricting telemarketing. The TCPA directs the FCC to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade, and to adopt regulations that protect subscribers' privacy rights without intruding unnecessarily and inappropriately on First Amendment rights. As part of this balancing process, Congress directed the FCC to consider the impact of certain categories of exempt calls.

In initially adopting rules pursuant to the TCPA, the Commission acknowledged that Congress required a balanced approach, and it implemented rules

accordingly. It noted that "the TCPA recognizes the legitimacy of the telemarketing industry," and adopted regulations that were targeted to prevent specific abusive practices. After notice and comment, the Commission adopted company-specific "do-not-call'' lists as "the most effective alternative to protect residential subscribers from unwanted live and artificial or prerecorded message solicitations." It concluded that the company-specific approach balanced the desire by telephone subscribers to avoid unwanted calls with "the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations."

The Commission rejected the alternative of a national "do-not-call'' database as "costly and difficult to maintain." It cited myriad practical problems with a national list, including the difficulty of keeping the information current in light of the fact that at least 20 percent of phone numbers change each year." The Commission pointed out that the costs of a national list would fall most heavily on small and start-up businesses, and that the increased costs would be passed along to consumers. In addition, it noted that local or regional telemarketers would be required to purchase and comply with a national "do-not-call'' list "even if they made no solicitations beyond their states or regions."

The Commission also rejected a national "do-not-call'' database as both over- and underinclusive. It agreed with various commenters that a national database forces homeowners to make an all or nothing choice: either reject all telemarketing calls, even those which the consumer might wish to receive, or accept all telemarketing calls, including those which the consumer does not wish to receive. The FCC found that this solution would not help telephone subscribers who would like to maintain their

ability to choose among those telemarketers from whom they do and do not wish to hear. At the same time, the Commission acknowledged that those who placed their names on the national list would still receive calls from exempt businesses or organizations.

By contrast, Commission noted that company-specific "do-not-call'' lists better reflected individual choice because they allow residential subscribers to selectively halt calls from telemarketers from whom they do not wish to hear. The company-specific approach, in the FCC's view, was more likely to be accurate than a national "do-not-call'' database, would be easier to keep up-to-date, and would best protect residential subscriber confidentiality since the individual lists would not be universally accessible. Moreover, the Commission found that the company-specific approach would be less burdensome for all concerned because it would leverage existing "do-not-call'' lists but would not require the creation of a national regulatory infrastructure.

The Commission pledged to monitor experience under the TCPA and, if necessary, initiate a further rulemaking. This is now being done. However, when it first described its continuing role, the FCC listed a number of options it could pursue other than imposing new rules. They included making sure consumers are fully informed of their rights under the TCPA, convening a cross-industry board or advisory council to evaluate complaints and recommend effective solutions, and generally enabling industry to devise other self-regulatory solutions. The Commission should take these possible approaches into consideration in this proceeding before it proposes new restrictions on telemarketing.

Changes Since 1992 Do Not Justify New Restrictions on Telemarketing

Changes in the marketplace since 1992 have not affected the Commission's conclusions or its reasoning in the first *TCPA* Report & Order. The growth in teleservices does not represent an increase in abuse, but is part of a general shift in consumer shopping patterns toward transactions that may be conducted from the home. Such transactions include catalogue purchases, use of home shopping channels on television, responses to telemarketing calls, shopping by computer, pay-per-view video, and on-line or telephone banking. The existence of some abusive telemarketing practices calls for policies that address the specific problems and for better enforcement of the TCPA. It does not warrant increased restrictions on legitimate telemarketing activities.

The FCC's experience with the TCPA does not support the proposal for a significant change in the rules. In the ten years since adoption of company-specific "do-not-call'' rules, the FCC has issued only one published decision, and no forfeiture orders, involving violations of the telephone solicitation rules. Rather than pointing to a record of enforcement difficulties, the Commission states that the current NPRM "is prompted, in part, by the increasing number and variety of inquiries and complaints about telemarketing."

Reference to the number of complaints says nothing about the extent to which telemarketing calls may be abusive. Using the FCC's own estimates about the number of calls made, only ,0002 percent result in complaints. But even this miniscule percent is misleading, since most complaints submitted to the FCC do not allege violations of the TCPAs "do-not-call'' requirements. A preliminary analysis of

complaints obtained pursuant to a Freedom of Information Act request show that about two-thirds of the complaints relate to other issues, such as "junk faxes" and other problems. Even so, the existence of a complaint does not mean any rules have been violated. The FCC emphasizes in its quarterly reports that it "receives many complaints that do not involve violations of the [Act] or a FCC rule or order," and that "a complaint does not necessarily indicate wrongdoing."

While counting the number of TCPA complaints is not an adequate basis for rulemaking, the Commission must provide access to the complaints to give commenters an adequate opportunity to evaluate its reasoning in initiating the NPRM. ATA has filed a FOIA request for this data, and the Commission should either make it available immediately or delay action in this proceeding until after the information has been disclosed. It should also waive the fee for "search and review" costs of approximately $25,000 it is currently proposing for access to the complaints.

Rather that seeking to decipher the meaning of unresolved TCPA complaints, the Commission should focus on the widespread compliance with, and the effectiveness of, its company-specific "do-not-call" list requirement. In doing so, it would discover that the glass is 99.9 percent full, and not .1 percent empty. The high rate of compliance stems from the fact that many companies voluntarily maintained such lists even before the FCC's rules went into effect. Teleservices providers take their obligation to honor company-specific do-not-call requests very seriously, and are quite diligent in maintaining the lists and necessary procedures to give effect to consumer desires in this area.

Some ATA members that operate on a nationwide basis maintain in-house "do-not-call'' lists that include tens of millions of names. They expend substantial resources to ensure that these lists are accurate and up-to-date. Even very small entities, that make relatively few calls and have only a handful of names on their do-not-call lists, scrupulously honor consumers' do-not-call requests. One ATA member maintains a "do-not-call'' list with only 13 names. These extreme variations illustrate the effectiveness of the TCPAs company-specific approach, in contrast to a nationwide, one-size-fits-all rule.

Company-specific lists are effective from the telephone subscriber's perspective as well. An independent survey commissioned by ATA found that about one-third of the respondents had asked to have their names placed on a telemarketer's "do-not-call'' list during the previous year. Of those respondents, nearly three-quarters found company-specific lists to be effective in preventing further calls. These findings even underestimate the effectiveness of "do-not-call'' lists, since experience in the states shows that many complaints are "false positives." As a general matter, there is no valid reason to significantly modify the current rules and adopt a national "do-not-call" database.

First Amendment Limits on Telemarketing Regulation

The FCC correctly recognizes the importance of constitutional analysis in this proceeding, but the NPRM assumes incorrectly that the intermediate First Amendment test for commercial speech should be applied to any new regulations. Consequently, the Commission seeks comment only on "whether a national do-not-call list satisfies each of the standards articulated in *Central Hudson,* 447 U.S. 557 (1980),

including the requirement that the regulation be narrowly-tailored to ensure that it is no more extensive than necessary to serve the governmental interest." However, for a variety of reasons, a national "do-not-call'' list requirement under the TCPA would be subject to strict First Amendment scrutiny.

The "do-not-call" provisions of the TCPA require a higher level of First Amendment scrutiny than normally applies in commercial speech cases because they are explicitly content-based. Although the commercial speech doctrine generally permits some content-based distinctions between speakers, this exception does not apply in this instance for three reasons: (1) the Commission's stated reason for regulating commercial but not non-commercial calls has nothing to do with commerce, but with a perceived ability to impose greater restrictions on a certain class of speakers simply because of their status; (2) imposing "do-not-call'' requirements on commercial calls does not promote privacy more than identical restrictions on non-commercial calls; and (3) the proposed restrictions suggest a governmental preference for certain messages over others. In this circumstance, case law strongly supports subjecting the proposed regulations to the strictest First Amendment scrutiny,

Yet even if the more forgiving standard normally applied to commercial speech is used, a national "do-not-call'' database requirement would not survive constitutional review. At a minimum, it is the government's burden to demonstrate that any new telemarketing rule (1) is needed to serve an important governmental interest; (2) directly and materially advances that interest; and (3) restricts no more speech than necessary. A national "do-not-call'' list requirement falls short on all three factors.

First, avoiding simple annoyance is not a significant governmental interest. ATA does not dispute that there is a generalized interest in residential privacy, but the FCC has a constitutional obligation to do more than simply name the interest it seeks to promote. The concept of privacy implicated by the TCPA is not the same as the Fourth Amendment protection against unreasonable searches, nor is it related to the public disclosure of private facts that is restricted by tort and statutory law. Rather, it seeks only to prevent the bother of a ringing telephone – a problem of far lesser importance than most that fall under the privacy banner. Indeed, the Supreme Court has made clear that shielding homeowners from unsolicited advertisements they are likely to find offensive or overbearing "carries little weight" when compared to the First Amendment interests at stake.

Second, a national "do-not-call'' database would not directly and materially advance the government's stated interest. Reviewing courts will not uphold restrictions on commercial speech that provide only ineffective or remote support for the government's purpose, and they are most skeptical of uneven or inconsistent restrictions. The TCPA expressly exempts noncommercial solicitation calls and certain types of commercial calls, and these inconsistencies cast serious doubt on the rule. A ringing phone has the same effect on residential privacy, regardless of the caller's identity or the subject of the call. As the Commission recognized in 1980, when it declined to adopt telemarketing rules on its own authority, "all solicitation calling – whether for charitable, political or business purposes – involves similar privacy implications." Later, when it adopted rules to implement the TCPA, the FCC assumed that commercial telemarketing calls were more of a concern. But even if the

Commission's conclusion in 1992 was valid at that time, the increasing volume of noncommercial calls during the past decade, combined with a lack of any real distinction in consumer attitudes toward the different types of calls, undermine this assumption. An independent survey commissioned by ATA confirms the commonsense notion that 81 to **84** percent of the public considers political, charitable and religious telemarketing calls as either less acceptable than or no different from other unsolicited calls. Such inconsistent treatment of commercial speech has led reviewing courts to invalidate restrictions in a wide variety of contexts, and would likely doom a national "do-not-call" database requirement.

Third, a national "do-not-call" database would restrict more speech than necessary to serve the government's interest. The Supreme Court recently stressed that "if the Government can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so." In this regard, it is important to note that the TCPA was predicated on a congressional finding that no effective technical solutions existed to address issues involving residential privacy. Now, however, ten years after the law was first implemented, technical alternatives exist that give individuals a great deal of choice about the nature and volume of calls they receive from all outside sources. These options enable homeowners to make individualized selections about which calls they would prefer to receive and those they would rather block without having to agree to the content-based categories set forth in the TCPA. In addition to market-based alternatives, the current TCPA rules provide a less restrictive alternative to a national database, and are more

directly targeted toward preventing abusive practices. Consequently, a national "do-not-call" rule would be unconstitutional.

Policy Conclusions and Recommendations

Based on the factual and legal developments since the Commission first adopted rules to implement the TCPA, ATA respectfully submits the following recommendations:

The Commission should retain existing rules requiring telemarketers to maintain company-specific "do-not-call" lists. The existing rules strike the appropriate balance required by the TCPA between privacy interests and basic rights of telemarketers. Company-specific "do-not-call" lists preserve the industry's ability to persuade its audience while respecting consumer rights to cut off further contact. The current rules have been effective in achieving the appropriate balance, whereas the all-or-nothing blanket approach of a nationwide "do-not-call" list would be unworkable, burdensome for teleservices providers, and would give consumers too little flexibility in controlling which telemarketing to receive and which to shut out.

The Commission should reduce the "do-not-call" request retention period to two years. This change in the rule is necessary given the frequency with which telephone numbers change or are reassigned, and the lack of record support for the original ten-year requirement.

The Commission should retain its current definition of "established business relationship" under the TCPA and FCC rules. The existing definition accurately reflects the preference of telephone subscribers for dealing with companies in which have demonstrated an interest. It would interfere greatly with ongoing

business relationships and impede communication between businesses and customers were the Commission to revisit its earlier conclusions in this area.

The Commission should retain the existing time of day restrictions that prohibit telemarketing calls to residences before 8 a.m. and after 9 p.m. local time. The existing limits reflect industry practice in effect before the TCPA rules were adopted, which grew out of the industry's interest in not alienating potential customers. There is no basis for changing those hours now. Reducing the hours during which companies can attempt to market goods or services telephonically, particularly during the evening hours, would unduly restrict telemarketing.

The Commission should clarify that its rules under the TCPA – and not state laws – govern teleservices that originate in one state and terminate in another. The full Commission should affirm a staff determination that the Communications Act grants the FCC exclusive authority over interstate and foreign communications, and that states authority is limited to purely intrastate calls. Section 2 of the Act and FCC precedent make clear that a state may not regulate teleservices that originate or terminate outside its borders.

The Commission should take no action with respect to predictive dialers other than to clarify that they are not "automatic telephone dialing systems" and to assert exclusive authority over predictive dialer regulation. Predictive dialers are an indispensable tool in cost-effective marketing efforts. However, they are generally not utilized to generate "random" or "sequential" numbers, which is the *sine qua non* of automatic telephone dialing systems. If the FCC does regulate in this area, it should require only that teleservices providers set predictive

dialers to achieve a ratio of dropped calls to calls answered of no more than five percent. The Commission also should refrain from regulating answering machine detection ("AMD") technology, which can cause a brief pause when a person answers the phone. If the FCC adopts a rule, however, a wait period no shorter than four seconds should be required. Finally, the Commission should clarify that it has exclusive jurisdiction over regulation of predictive dialers and AMD technology as customer premises equipment.

The Commission should take steps to place teleservices calls to wireline and wireless phones on more equal footing. The Commission should find that predictive dialers are not "autodialers" for the purpose of calling wireless phones. Otherwise, it should find that wireless phone billing arrangements have changed over time so that subscribers do not pay for incoming calls. Thus, the TCPA should not prohibit such calls to wireless phones, including cellular, PCS and SMR service. If the Commission rejects this proposal, it should at least clarify that no rule violation may be found unless a telemarketer has reason to know that a given telephone number is assigned to a wireless phone.

The Commission should apply its informal complaint rules to telemarketing companies. Bringing teleservices within the informal complaint rules would aid consumers by streamlining and coordinating the complaint process for all issues. It would also help telemarketers in their compliance efforts by providing notice about consumer concerns.